Supreme Court, U.S.
FILED

051148 MAR 8 - 2006

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

C.D. OF NYC, INC., and D.J. OF AMERICA, INC.,
d/b/a Diajewel of America, PETITIONERS

v.

UNITED STATES POSTAL SERVICE.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KRISHNAN CHITTUR
Counsel of Record
CHITTUR & ASSOCIATES, P.C.
The Lincoln Building
60 East 42nd Street
Suite 1501
New York, NY 10165
Tel: (212) 370-0447
Attorneys for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

QUESTIONS PRESENTED

I. Does the immunity for "loss" of postal matter under the Federal Tort Claims Act, 28 U.S.C. §2680(b), protect USPS from liability for its employees' theft of registered, insured, packages?

II. Where USPS rejects a postal customer's insurance claim on the ground that a package was not in the mail, is the USPS estopped from asserting that the same package was "in the mail" for purposes of immunity under FTCA, 28 U.S.C. §2680(b)?

RULE 29.6

Petitioners C.D. of N.Y., Inc., and D.J. of America, Inc., (cumulatively, "DiaJewel") are both New York corporations, with no parent or subsidiary corporations. No publicly held corporations own 10 percent or more of the stock of either corporation.

Respondent United States Postal Service is an "independent establishment of the Government of the United States," 39 U.S.C. §201, which may "sue and be sued in its official name," 39 U.S.C. §401(1).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 9

CONCLUSION 14

APPENDIX

Circuit Court Opinion 1a

District Court Decision 6a

Relevant Record Excerpts 19a

Relevant Provisions Involved 25a

TABLE OF AUTHORITIES

Page

CASES

ALLIED COIN INV., INC. v. U.S. POSTAL SERVICE, 673 F.SUPP. 982, 987 (D. MINN. NOV 05, 1987) 16

AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. v. HYDROLEVEL CORP., 456 U.S. 556, 566 (1982) 17

ARNO v. CLUB MED INC., 22 F.3D 1464, 1469 (9TH CIR. 1994) 16

AVERY v. UNITED STATES, 434 F.SUPP. 937, 945 (D.CONN. 1977) 13

BARBIERI v. HARTSDALE USPS, 856 F. SUPP. 817, 818 (S.D.N.Y. 1994) 13

BENEFICIAL FINANCE CO. v. DALLAS, 571 F.2D 125, 128 (2ND CIR. 1978) 15

BIRNBAUM v. UNITED STATES, 588 F.2D 319 (2ND CIR. 1978) 8, 13

BRANDT v. HICKEL, 427 F.2D 53, 57 (9TH CIR 1970) 4, 6

BRINK'S LTD. v. SOUTH AFRICAN AIRWAYS, 93 F.3D 1022, 1028-1029 (2ND CIR. 1996) 16

C.D. OF NYC, INC. v. U.S. POSTAL SERVICE, 2004 WL 2072032 (S.D.N.Y. SEP 16, 2004) 1

C.D. OF NYC, INC. v. U.S. POSTAL SERVICE, 2005 WL 3322993 (2ND CIR. DEC 08, 2005) 1

CRESSER v. AMERICAN TOBACCO CO., 662 N.Y.S.2D 374, 378-79 (N.Y.SUP. 1997) 8

DALEHITE v. UNITED STATES, 346 U.S. 15, 45 (1953) 12

DOLAN v. UNITED STATES POSTAL SERVICE, (DKT. NO. 04-848), 2006 WL 397935, *4 (FEB. 22, 2006) ... 2, 9, 10, 11

E.F. HUTTON GROUP, INC. v. U.S. POSTAL SERVICE, 723 F.SUPP. 951, 957 (S.D.N.Y. 1989) 16

FRANCHISE TAX BD. v. UNITED STATES POSTAL SERVICE, 467 U.S. 512, 519-520 (1984) 12

FRIDMAN v. POSTMASTER GENERAL, U.S. POSTAL SERVICE, 1996 WL 90543, *1 (E.D.N.Y. 1996) 13

GLEASON v. SEABOARD AIR LINE CO., 278 U.S. 349 (1929) 16

HATAHLEY v. UNITED STATES, 351 U.S. 173 (1956) 12

KOSAK v. UNITED STATES, 465 U.S. 848, 855 (1984) 14

LOEFFLER v. FRANK, 486 U.S. 549, 556 (U.S. 1988) 12

LOUIS PIZITZ DRY GOODS CO. v. YELDELL, 274 U.S. 112, 116 (1927) 3

MARINE INSURANCE CO. v. UNITED STATES, 378 F.2D 812 (2ND CIR. 1967) 2, 7, 8, 15

NEW HAMPSHIRE v. MAINE, 532 U.S. 742, 751 (2001) 14

PAC. MUT. LIFE INS. CO. v. HASLIP, 499 U.S. 1, 14 (1991) 4

PORTMANN V. UNITED STATES, 674 F.2D 1155, 1168 (7TH CIR. 1982) 15

RAILA, 355 F.3D AT 121 14

REYNOLDS V. COMM'R, 861 F.2D 469, 472 (6TH CIR. 1988) 15

ROCK ISLAND, ARKANSAS, & LOUISIANA R.R. V. UNITED STATES, 254 U.S. 141, 143(1920) 3

ROGERS V. U.S. POSTAL SERVICE, 2005 WL 3369982, *2 (W.D.VA. DEC. 12, 2005) 4

SACKMAN V. LIGGETT GROUP, INC., 965 F.SUPP. 391, 396 (E.D.N.Y. 1997) 8

SPORTS CAR CENTRE OF SYRACUSE, LTD. V. BOMBARD, 672 N.Y.S.2D 201, 203 (N.Y.APP.DIV. 1998) 16

STANDARD SURETY & CASUALTY CO. OF NEW YORK V. PLANTSVILLE NAT. BANK, 158 F.2D 422, 424 (2ND CIR. 1946), CERT. DENIED, 331 U.S. 812 (1947) 17

SUCHOMAJCZ V. UNITED STATES, 465 F.SUPP. 474, 476 (E.D.PA. 1979) 10

UNITED STATES V. CUSHMAN & WAKEFIELD, INC., 275 F.SUPP.2D 763, 778 (N.D.TEX. 2002) 13

UNITED STATES V. SEARS, ROEBUCK & CO, 778 F.2D 810, 818 (D.C. CIR. 1985) 3

UNITED STATES V. STURDIVANT, 244 F.3D 71, 78 (2ND CIR. 2001) 14

WATKINS V. UNITED STATES, 2003 WL 1906176, *5 (N.D.ILL. APRIL 17, 2003) 16

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §1346(b) 1, 12

28 U.S.C. §2680 11

28 U.S.C. §2680(b) 1, 2, 7

28 U.S.C. §2680(h) 7

39 U.S.C. §401(1) 1

39 U.S.C. §409(c) 1

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at *C.D. of NYC, Inc. v. U.S. Postal Service*, 2005 WL 3322993 (2nd Cir. Dec 08, 2005). The District Court's opinion is reported at *C.D. of NYC, Inc. v. U.S. Postal Service*, 2004 WL 2072032 (S.D.N.Y. Sep 16, 2004).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). The United States Court of Appeals for the Second Circuit entered its decision on DiaJewel's appeal on December 8, 2005. This petition is filed within 90 days of the date of entry of that order, and is hence, timely. Rule 13.1, Sup. Ct. R.

RELEVANT PROVISIONS INVOLVED

28 U.S.C. §1346(b)
28 U.S.C. §2680(b)
39 U.S.C. §401(1)
39 U.S.C. §409(c)

STATEMENT

Petitioners sued to recover damages from the USPS for theft (conversion and other torts) by 2 USPS employees of hundreds of diamond packages delivered to them for transmission as registered, insured mail. USPS authorized these employees to accept these packages in the normal course of business in a busy post office in the heart of New York; they did so accept, but never sent the packages for routine processing.

USPS subsequently denied insurance coverage under the guise that the packages were not "rightfully" in the mail.

Petitioners brought this action under the Federal Tort Claims Act. USPS sought dismissal under Rule 12(b)(1), 12(b)(6), and 12(h)(3), Fed. R. Civ. P. The United States District Court for the Southern District of New York dismissed all claims, holding them to be barred by the postal matter and the intentional torts exceptions to FTCA, and under New York law.

On appeal, the United States Court of Appeals for the Second Circuit affirmed. Relying upon *Marine Insurance Co. v. United States*, 378 F.2d 812 (2nd Cir. 1967), that Court held that DiaJewel's claims were barred by the "loss, miscarriage, or negligent transmission" exception, 28 U.S.C. §2680(b). On this view, that Court did not address the other grounds relied upon by the District Court.

DiaJewel seeks review under Rule 10(a) and (c) of this Court's Rules. The Second Circuit decided an important issue of federal law, interpreting §2680(b) in a manner that conflicts with this Court's earlier rulings, which is only highlighted by this Court's recent decision in *Dolan v. United States Postal Service*, (Dkt. No. 04-848), 2006 WL 397935, *4 (Feb. 22, 2006) that "lost" means "destroyed or misplaced," not stolen.

The issue is of tremendous public significance. USPS carries 660 million pieces of mail every day, many of it insured and registered. In many cases, USPS is the only realistic option for transmission of packages across the country. Citizens should be able to hold USPS accountable for employee theft/misconduct - such corporate accountability is, after all, the bedrock of commercial transactions.

Moreover, USPS already enjoys immunity in significant respects, which immunity is unavailable to its competitors such as UPS and FedEx. The Second Circuit's decision immunizing USPS theft is a further extension of this immunity which is statutorily unwarranted and commercially unacceptable.

USPS' own rejection of liability for the "insured mail" on the ground that the very same packages were not in the mail only highlights this. As Justice Ginsburg observed,

> Justice Holmes observed over a half century ago that citizens "must turn square corners when they deal with the Government." *Rock Island, Arkansas, & Louisiana R.R. v. United States*, 254 U.S. 141, 143(1920). In return, citizens may reasonably expect that their government will refrain from running circles around them.

United States v. Sears, Roebuck & Co, 778 F.2d 810, 818 (D.C. Cir. 1985).

Petitioners here did everything they could to protect themselves. Moreover, the open, brazen thefts at issue from an extremely busy post office - and that too, continuing over two years - could well make out a case for USPS's criminal indifference to its obligations to the public; a private business under the circumstances could even face punitive damages:

> Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be prevented." *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927). If an insurer

> were liable for such damages only upon proof that it was at fault independently, it would have an incentive to minimize oversight of its agents. Imposing liability without independent fault deters fraud more than a less stringent rule.

Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991). Under the circumstances, leaving Petitioners holding the bag is not "worthy of our great government," *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir 1970). The petition should be granted.

Factual History

Petitioners are wholesalers in the diamond and jewelry business in Manhattan. Regularly, they ship several packages every day to customers through USPS by registered,[1] insured mail. USPS publicly and consistently proclaims the heightened security and indemnity for such "extra services:"

> Insurance Purchased at a Post Office
>
> • Provides up to $5,000 indemnity coverage for a lost, rifled, or damaged article.
>
> • For items of greater value requiring additional insurance, try Registered Mail™, which covers up to $25,000. . .

---

[1]USPS has consistently maintained "that registered mail is the most secure form of mailing available." *Rogers v. U.S. Postal Service*, 2005 WL 3369982, *2 (W.D.Va. Dec. 12, 2005).

http://www.usps.com/insurance/welcome.htm.[2]

Petitioners' employees routinely go to the USPS branch at Rockefeller Center carrying these packages, with each package identified and recorded in duplicate in a covering postal manifest. Upon receipt of the requisite charges for postage and insurance, USPS would accept the packages with one copy of the manifest, and return the other copy of the manifest, duly stamped, as Petitioners' receipt.

The Rockefeller Center post office is a very busy branch of USPS in the heart of Manhattan. It caters to a large number of business customers "and is known to handle large financial transactions such as shipping valuables and other negotiable instruments," 23a. Nevertheless, USPS permitted two employees – who it had hired apparently without conducting even the most basic background check – to handle valuable packages routinely, 23a:

> Upon the results found in the backgrounds of these individuals, it is certain that any bank brokerage house or other responsible institution would not entrust an applicant with these backgrounds in any type of position that would involve a financial responsibility.

From September 2000 to May 2002, these two USPS employees conspired with two of Petitioners' employees to steal hundreds of the packages from several manifests. They struck out these specific packages from USPS's copy of the manifest, and returned the other copy, duly stamped without any

---

[2]All emphasis in quotations is supplied.

strike outs, to Petitioners. The stolen packages were thus never actually put in the mail for transmission.

Since Petitioners' receipt contained no strikeouts, they were kept unaware of the theft. Before they eventually discovered the scheme, about $1.5 million worth of diamonds had been stolen. *Id.*, ¶9.

Petitioners filed a Notice of Claim as required. USPS did not respond, and this lawsuit followed.

Petitioners also filed insurance claims with USPS.[3] USPS disclaimed liability for two such claims on the ground that "the article was not rightfully in the mail since it had not been ordered by the addressee." 19a, 20a. USPS never responded to the other claims,[4] or petitioners' appeals from these rejections. A-4¶12.

The Instant Action

Petitioners brought this action in July 2003, asserting tort claims against USPS. USPS sought dismissal for want of subject-matter jurisdiction under the FTCA, and for failure to state a claim, 12(b)(1), (6), and 12(h)(3), Fed. R. Civ. P.

---

[3]USPS requires insurance claims to be filed within 180 days from the date of mailing. *United States Postal Service, Domestic Mail Manual* pt. 609.1.4 (January 8, 2006). Here, by the time petitioners discovered the theft, insurance claims for several packages had become time-barred.

[4]After the decision at issue, USPS has notified petitioners of the rejection of all their claims.

The District Court's Order

The District Court granted that motion on every ground asserted by USPS, 6a-18a. First, it held the claims barred by the postal matter exception, 28 U.S.C. §2680(b), finding this case "indistinguishable" from *Marine Ins. Co. v. United States*, 378 F.2d 812 (2nd Cir.), *cert. denied*, 389 U.S. 953 (1967).

Further, that Court applied the intentional torts exception, 28 U.S.C. §2680(h), finding that the misrepresentation claims here were "clothed in the garb of negligence," 12a (citations omitted). It did not address the conversion claims in this context, but held that the remaining claims were barred "[t]o the extent" they "arise out of the fraudulent misrepresentations in the postal manifests," 13a.

Moreover, the District Court held that New York courts were "agreed" that "theft by an employee is not within the scope of the employment," and employers were not liable for employee theft, 13a (citations omitted). It discarded 2 opinions from intermediate New York appeals courts squarely holding otherwise as being a "minority view in contradiction to the general view," 15a, and also distinguishable as involving conduct "much closer to the scope of employment" than here because USPS's business was not converting its patrons' mail, *id.*

Disregarding the notice pleading rule, Rule 8(a), Fed. R. Civ. P., the Court held that petitioners had not alleged any reason for USPS to suspect the employees. Instead, it described petitioners' assertion that the unfettered, brazen misconduct which continued for about 2 years reflected USPS's negligence as an "unreasonable conclusion," 15a. Thus, the conversion claim and thence, the conspiracy claim, were not viable,

16a. Confusing the conspiracy claim with that for concerted action[5], 16a, the District Court dismissed that claim also.

Lastly, the District Court dismissed the claim for negligent supervision because there was "no showing" that USPS "knew of such propensities," or that the conversions were foreseeable, 16a. It said nothing about USPS's negligence in hiring or retention, or the need for discovery into USPS's practices concerning auditing of its receipts or video surveillance on its business premises, for example.

The claims for unjust enrichment and money had and received were not viable, that Court held, because "[e]quity and good conscience" did not demand that USPS be held accountable here, 18a. Accordingly, it dismissed all the claims.

The Second Circuit's Decision

On appeal, the Second Circuit affirmed, citing *Marine Insurance Co.*, 378 F.2d 812. It distinguished its later decision in *Birnbaum v. United States*, 588 F.2d 319 (2nd Cir. 1978), on the ground that "after the examination in *Marine Insurance*, the mail had been lost, whereas in *Birnbaum* the mail was not lost,

---

[5]These claims differ "in the fact that concerted action requires each of the parties to the unlawful agreement to have committed a tortious act while conspiracy requires only one of the participants of the agreement to have committed an overt act in furtherance of the agreement." *Cresser v. American Tobacco Co.*, 662 N.Y.S.2d 374, 378-79 (N.Y.Sup. 1997); *see also Sackman v. Liggett Group, Inc.*, 965 F.Supp. 391, 396 (E.D.N.Y. 1997) (plaintiff "might still be able to maintain a claim based on concerted action").

making the 'postal matter' exception inapposite." Accordingly, it dismissed all claims.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Should Be Reviewed Because It Decides an Important Question of Federal Law In A Manner That Is Inconsistent With This Court's Rulings

The decision at issue is inconsistent with repeated decisions of this Court mandating a restricted construction of 2680(b) immunity, especially in view of the Postal Reorganization Act. This is highlighted by *Dolan*, decided over 2½ months after the decision.

In *Dolan*, this Court considered claims for damages arising from a slip and fall accident due to mail negligently left on a porch by a postal employee. USPS contended that liability was barred by 2680(b), and the Third Circuit upheld that contention.

Reversing, this Court observed that while "transmission" would ordinarily include "delivery," its import in 2680(b) required consideration of the whole statutory text, the purpose and context of 2680(b), and relevant precedents/authorities. 2006 WL 397935, at *3. First, the context in which the words "negligence in transmission" occurred in 2680(b) required a narrow construction, given the two preceding words, "loss" and "miscarriage:"

> Here, as both parties acknowledge, mail is "lost" if it is destroyed or misplaced and "miscarried" if it goes to the wrong address.

Id. These terms referred to "failings in the postal obligation to deliver mail in a timely manner to the right address," *id.* Hence, "negligence in transmission" could not be given a much broader scope.

Second, Congressional history and precedents clarified that a major purpose of the FTCA was to permit claims for auto accident damages and hence, 2680(b) had been narrowly crafted. Auto use was certainly part of mail "transmission;" since negligence claims in that respect were clearly permissible by the FTCA, "negligent transmission" in 2680(b) could not "cover all negligence in the course of mail delivery." *Id.*, *5. Through 2680(b), "Congress intended to retain immunity, as a general rule, only for injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address." *Id.*[6]

---

[6]Section 2680(b)'s legislative history abundantly supports petitioners here. As another Court held, under comparable legal circumstances:

> None of the reasons suggested by the legislative history is applicable here. The plaintiffs do not present a claim for "which it would be unjust to make the government liable," nor one which the government would find "difficult to defend" by reason of unavailability of proofs or evidence. This case will not lead to the landslide of litigation against the government which Congress desired to avoid. Finally, while postal patrons may protect themselves against negligent handling of the mails through insuring or registering their packages or letters, such protection was obviously not applicable to the injured persons in this case.

Suchomajcz v. United States, 465 F.Supp. 474, 476 (E.D.Pa. 1979). Here, too, it is "not unjust" to hold USPS liable for petitioners' claims; such claims would certainly lie against UPS and FedEx, for example. They are not "difficult to defend" for the USPS which, in

Such a narrow construction was supported, this Court reasoned, by the significantly wider exceptions authorized in other FTCA provisions. Equally important for present purposes, this Court observed

> Losses of the type for which immunity is retained under §2680(b) are at least to some degree avoidable or compensable through postal registration and insurance.

Id., *6 (*citing United States Postal Service, Domestic Mail Manual* pt. 609.1.1 (Nov. 10, 2005)).

Lastly, this Court observed that the principle of narrow construction of sovereign immunity waiver was inapplicable since "generous interpretations" would defeat the "central purpose of the statute," *id.* The Court's function in construing 28 U.S.C. §2680 is to identify "'those circumstances which are within the words and reason of the exception'--no less and no more." *Id.* (citations omitted). Hence, slip and fall claims were not barred by 2680(b).

Dolan was consistent with repeated pronouncements from this Court that

> Congress also indicated that it wished the Postal Service to be run more like a business than had its predecessor, the USPS Department.

---

fact, has much of the "proofs or evidence." This case will not lead to a landslide of litigation, because employee theft **should** not be a widespread phenomenon, especially given today's technological advances in surveilliance and monitoring techniques. Finally, as USPS itself has held, its insurance does not permit postal patrons to protect themselves from its own employees' theft.

Franchise Tax Bd. v. United States Postal Service, 467 U.S. 512, 519-520 (1984); *accord, Loeffler v. Frank*, 486 U.S. 549, 556 (U.S. 1988) ("the sue-and-be-sued clause must be liberally construed and that the Postal Service's liability must be presumed to be the same as that of any other business," citations omitted).

The decision at issue is at odds with *Dolan*. The mail here was neither destroyed nor misplaced, and hence, was not "lost", as *Dolan* observed. Moreover, the FTCA's purpose was not to immunize USPS from employee theft. And of course, USPS itself has held that the loss here was not compensable through insurance or registration of the mail. Thus, the Writ should be granted under Rule 10(a) and (c).

II. Alternatively, The Second Circuit Has Decided An Important Issue of Federal Law Which Has not Been, But Should Be, Decided By this Court

A. 2680(b) Cannot Be Construed to Cover Intentional Conduct

The jurisdictional statute, 28 U.S.C. § 1346(b), covers "wrongful" as well as negligent acts of government employees. *Hatahley v. United States*, 351 U.S. 173 (1956); *Dalehite v. United States*, 346 U.S. 15, 45 (1953). Section 2680(b) carves out an exception which, as clear from *Dolan*, is for **unintentional** conduct, i.e., negligence, whereby mail is destroyed, misplaced, or wrongly delivered.

Indeed, the Second Circuit itself categorically declared in an earlier case decided after the Postal Reorganization Act:

> The language of the exception itself indicates that **it was not aimed to encompass intentional acts.** Had Congress intended to bring intentional disturbance of the integrity of a letter within the postal exception, it would not have used the term "negligent transmission." Nor were the letters lost or miscarried. "Miscarriage" in the context of mail means misdelivery.

Birnbaum, 588 F.2d at 328. *Accord*, *Barbieri v. Hartsdale USPS*, 856 F. Supp. 817, 818 (S.D.N.Y. 1994) ("The mail involved here was neither misdelivered nor lost. Nor was there negligence in the transmission of the mail to the recipient." Motion to dismiss denied); *Fridman v. Postmaster General, U.S. Postal Service*, 1996 WL 90543, *1 (E.D.N.Y. 1996) (""Miscarriage in the context of the mails has been defined as misdelivery"); *Avery v. United States*, 434 F.Supp. 937, 945 (D.Conn. 1977) ("The plaintiff's letters were neither lost, miscarried, nor negligently transmitted; they were intentionally taken out of the mail, to become the subject of HTLINGUAL, with all that that entailed;" 2680 inapplicable); *Sheldon Jewelry Co. v. United States Postal Serv.*, 2001 U.S. Dist. LEXIS 6152, *9 (W.D. Tex. 2001) (same); *United States v. Cushman & Wakefield, Inc.*, 275 F.Supp.2d 763, 778 (N.D.Tex. 2002) (2680(b) does not cover USPS's negligence in giving postage refund checks to manager who converted them to his own use).

Here, Petitioners's claims arise not from unexplained destruction, miscarriage or misdelivery, but from theft. At issue are **intentional** acts of USPS's employees. As such, they are beyond the "loss, miscarriage or negligent transmission" exception. *See*

Raila, 355 F.3d at 121 (2680(b) "language is narrower than the language of other exceptions"); *Kosak v. United States*, 465 U.S. 848, 855 (1984)).

B. USPS's Own Acknowledgment That the Packages Were Not in the Mail Precludes the Exception

USPS's consistent public representation that its insurance provides "indemnity coverage for **lost**, rifled or damaged article" is extremely material to the claims at bar. By rejecting the insurance claims, USPS **necessarily** held that stolen packages were **not** "lost" packages.

USPS' turnaround to assert the contrary position in Court illustrates Justice Ginsberg's classic comment of "running circles" around citizens. According to USPS, packages are simultaneously **in the mail** so that USPS is unaccountable in Court, but also **not in the mail** so that USPS does not have to pay insurance claims.

Postal customers who relied upon USPS's consistent representations of security and indemnity provided by these "extra services," and paid valuable consideration for transmitting packages by registered, insured mail deserve better. "The integrity of the judicial process is threatened when a litigant is permitted to gain an advantage by the manipulative assertion of inconsistent positions, factual or legal." *United States v. Sturdivant*, 244 F.3d 71, 78 (2nd Cir. 2001) (*quoting Helfand v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997)); *see also New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) ("the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if

not estopped"). Or, as another Court put it, USPS should be precluded from "playing fast and loose with the courts," "blowing hot and cold as the occasion demands," or "hav[ing] [its] cake and eat[ing] it too." *Reynolds v. Comm'r*, 861 F.2d 469, 472 (6th Cir. 1988) (citations omitted). Howsoever phrased, this salutary principle should be applied to bar USPS from invoking 2680(b) here.

C. Marine Ins. Should Be Declared to be No Longer Good Law In View of the Postal Reorganization Act

Marine Ins., 378 F.2d 812, involved an isolated theft, one package of emeralds shipped from Switzerland to a New York importer. The Second Circuit upheld the post office's immunity under 2680(b), 378 F.2d at 814-15.

However, *Marine Ins.* was decided in 1967, 3 years before the Postal Reorganisation Act of 1970 and its embrace of private commercial standards for the USPS. Hence, as the Second Circuit Court itself has held, "the claim that the USPS should retain the broad immunity afforded its predecessor simply ignores the responsibilities which attend its new autonomy," *Beneficial Finance Co. v. Dallas*, 571 F.2d 125, 128 (2nd Cir. 1978); *see also Portmann v. United States*, 674 F.2d 1155, 1168 (7th Cir. 1982) ("The delivery of mail itself is not inherently an operation that must be government-operated and in fact is not exclusively so operated today. [UPS] is but one example of a private mail delivery system. . .").

Despite this sea-change in the legal and commercial environment, many lower courts - including both courts below in this case - have continued to follow

Marine Insurance blindly. Without addressing the ramifications of the Reorganization Act, courts have simply continued to apply 2680(b) to theft of mail. *See, e.g., Watkins v. United States*, 2003 WL 1906176, *5 (N.D.Ill. April 17, 2003); *Allied Coin Inv., Inc. v. U.S. Postal Service*, 673 F.Supp. 982, 987 (D. Minn. Nov 05, 1987); *E.F. Hutton Group, Inc. v. U.S. Postal Service*, 723 F.Supp. 951, 957 (S.D.N.Y. 1989).

Indisputably, a private employer is liable for its employees' thefts within the scope of employment; "few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own," *Gleason v. Seaboard Air Line Co.*, 278 U.S. 349 (1929) (employer liable for damages caused by forgery of employee); *Accord, Sports Car Centre of Syracuse, Ltd. v. Bombard*, 672 N.Y.S.2d 201, 203 (N.Y.App.Div. 1998) ("[a]n employer may be vicariously liable for conversion by an employee where the employee is acting within the scope of his apparent authority"); *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1028-1029 (2nd Cir. 1996) ("theft by an employee must be imputed to the employer for purposes of liability"); *Arno v. Club Med Inc.*, 22 F.3d 1464, 1469 (9th Cir. 1994) (same).

Such accountability is integral to commerce in today's impersonal corporate world. After all, the customer has no control over the business' operations. As this Court declared,

> Indeed, even in those instances, where the agent is guilty of fraud, and acts solely to benefit himself, the principal remains liable for the conduct of the agent . . .

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 566 (1982); *accord, Standard Surety & Casualty Co. of New York v. Plantsville Nat. Bank*, 158 F.2d 422, 424 (2nd Cir. 1946), *cert. denied*, 331 U.S. 812 (1947).

USPS's immunity for theft is thus an unacceptable anomaly in today's world. This Court should resolve this anomaly, and hold the USPS answerable to its customers, without anachronistic immunities which are leftovers from an era long bygone.

CONCLUSION

The Court should grant the writ as prayed for, review the Second Circuit's decision and reverse it, and remand the case for discovery and trial.

Respectfully submitted,

KRISHNAN CHITTUR
Counsel of Record
CHITTUR & ASSOCIATES, P.C.
The Lincoln Building
60 East 42nd Street
Suite 1501
New York, NY 10165
Tel: (212) 370-0447
Attorneys for Petitioners

(any footnotes trail end of each document)

No. 04-5326

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

C.D. OF NYC, INC., and D.J. OF AMERICA, INC., d/b/a Diajewel of America, Plaintiffs-Appellants,

v.

UNITED STATES POSTAL SERVICE, Defendant-Appellee.

December 8, 2005, Decided

NOTICE: RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: FOR APPELLANTS: KRISHNAN CHITTUR, Chittur & Associates, P. C., New York, NY.

FOR APPELLEE: JOSEPH A. PANTOJA, Assistant United States Attorney (David N. Kelley, United States Attorney for the Southern District of New York, and Sara L. Shudofsky, Assistant United States Attorney, on the brief), United States Attorney's Office for the Southern District of New York, New York, NY.

JUDGES: PRESENT: AMALYA L. KEARSE, JOSE A. CABRANES, Circuit Judges, RICHARD M. BERMAN, District Judge *.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and hereby is AFFIRMED.

Plaintiffs C.D. of NYC, Inc. and D.J. of America, both diamond merchants, filed a complaint against the United States Postal Service ("USPS") in the District Court dated July 7, 2003 bringing claims of conversion, "money had and received," unjust enrichment, negligent supervision, concerted action, and civil conspiracy. In an opinion and order dated September 16, 2004, the District Court dismissed the action, holding that the District Court lacked jurisdiction under (a) the "postal matter" exception, (b) the "intentional torts" exception to the United States' consent to be sued under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 et seq. ("FTCA")[1] , and (c) the requirement that the claims be of a type on which a private person would be liable to the plaintiffs under the law of the state where the challenged act or omission occurred, *see* 28 U.S.C. § 1346(b)(1).

We assume the parties' familiarity with the underlying facts and procedural history.

Plaintiffs' complaint concerned repeated thefts conducted over about two years, in which plaintiffs' employees ("diamond employees") conspired with USPS

employees to steal about $ 1.5 million in jewelry from the plaintiff diamond sellers. The diamond employees would bring parcels of diamonds to the Rockefeller Center USPS branch and would hand the parcels to the confederate USPS employees. The USPS employees gave the diamond employees false documents (which the diamond employees provided to their employers) purporting to show that the parcels had been truly mailed. They had not. Instead, the USPS employees stole the parcels.

The District Court correctly held that the "postal matter" exception of the FTCA bars jurisdiction over this case and therefore properly dismissed the action. As we held in *Marine Insurance Co. v. United States*, 378 F.2d 812, 814 (1967), theft of parcels by a federal employee responsible for the supervision of mail (in that case, a Bureau of Customs employee who worked in the area in which international mail was processed) falls within the exception. Our subsequent holding in *Birnbaum v. United States*, 588 F.2d 319, 328 & n. 20 (2d Cir. 1978), does not change the result. In *Birnbaum*, we distinguished *Marine Insurance* and allowed suit by persons whose mail had been covertly opened and read by the Central Intelligence Agency. Section 2680(b) excludes claims arising from mail that was "lost"; the key difference between *Birnbaum* and *Marine Insurance*, both of which involved law enforcement authorities, was that after the examination in *Marine Insurance*, the mail had been lost, whereas in *Birnbaum* the mail was not lost, making the "postal matter" exception inapposite. *See id.* at 328 n. 20. Here plaintiffs complain of mail brought to a United States Post Office, handed to USPS employees, and stolen by the persons employed by the USPS to handle mail.

Under *Marine Insurance*, the District Court lacks jurisdiction.

* * *

In the circumstances presented here, we need not reach or discuss the remaining issues raised on appeal.

The judgment of the District Court is AFFIRMED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* The Honorable Richard M. Berman, of the United States District Court for the Southern District of New York, sitting by designation.

n1 The FTCA provides, in relevant part, that

> the district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

The "postal matter" exception bars suit on the basis of any "claim arising out of the loss, miscarriage, or

negligent transmission of letters or postal matter." 28 U.S.C. § 2680(b).

In relevant part, the "intentional torts" exception bars suit on the basis of any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. ...

28 U.S.C. § 2680(h).

03 Civ. 5055 (JFK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C.D. OF NYC INC., and D.J. OF AMERICA, INC., d/b/a DIAJEWEL OF AMERICA,
Plaintiffs,

-against-

UNITED STATES POSTAL SERVICE,
Defendant.

September 16, 2004, Decided
September 16, 2004, Filed

COUNSEL: For C.D. of NYC Inc., and D.J. of America, Inc., d/b/a Diajewel of America, Plaintiffs: Krishnan Chittur, Esq., Of Counsel, Chittur & Associates, P.C., New York, NY.

For United States Postal Service, Defendant: Joseph A. Pantoja, Of Counsel, James B. Comey, United States Attorney for the Southern District of New York, New York, New York.

JUDGES: JOHN F. KEENAN, United States District Judge.

OPINION BY: JOHN F. KEENAN

OPINION:

OPINION and ORDER

JOHN F. KEENAN, United States District Judge:

Background

Plaintiffs are diamond and jewelry merchants in Manhattan. Plaintiffs claim that two of their own employees conspired with two employees of the United States Postal Service ("U.S.P.S." or "Postal Service") to convert plaintiffs' jewelry. According to the complaint, plaintiffs' two employees would deliver packages of jewelry, along with an original and one copy of a manifest, to the Rockefeller Center Post Office, and the two Postal Service employees would accept the packages on behalf of the Postal Service. The Postal Service employees would indicate receipt of all packages listed on the original manifest, and the plaintiffs' employees would return that manifest to plaintiffs. However, on the duplicate manifest kept in U.S.P.S. records, the Postal Service employees would strike some of the packages and then would keep those packages for themselves. This conduct allegedly continued for nearly two years, resulting in approximately $ 1.5 million in jewelry never reaching plaintiffs' customers.

Plaintiffs bring claims for conversion, money had and received, unjust enrichment, negligent supervision, concerted action, and civil conspiracy. Plaintiffs seek $ 1.5 million in damages, plus attorneys' fees, costs, expenses, and disbursements.

The U.S.P.S. moves to dismiss plaintiffs' claims for lack of subject matter jurisdiction pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(h)(3)*, and for failure to state a claim upon which relief may be granted pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons that follow, the Postal

Service's motion is granted and plaintiffs' claims are dismissed.

I. 12(b)(1) and 12(b)(6) Standards

Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of a complaint when the federal court lacks jurisdiction over the subject matter. Because a lack of subject matter jurisdiction renders other defenses moot, a court usually gives first consideration to a motion to dismiss under *Rule 12(b)(1). Friedman v. United States, 2003 U.S. Dist. LEXIS 4326, No. 01 Civ. 7518 (LTS) (RLE), 2003 WL 1460525 at *5 (S.D.N.Y. Mar. 18, 2003)*; *Prestop v. Hamlett, 2001 U.S. Dist. LEXIS 4499, No. 99 Civ. 2747 (GBD), 2001 WL 363676 at *6 (S.D.N.Y. Apr. 12, 2001)*. Where the defendant challenges the legal, and not the factual, sufficiency of the plaintiff's jurisdictional allegations, the district court takes all facts alleged in the complaint as true, and draws all reasonable inferences in favor of the plaintiff. *Robinson v. Gov't of Malaysia, 269 F.3d 133, 140 (2d Cir. 2001)*(citations omitted). However, when jurisdictional facts are called into question, id., "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998)* (citation omitted); *Smith v. Potter, 208 F. Supp. 2d 415, 417 (S.D.N.Y. 2002)* (citations omitted).

On review of a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a court must accept the plaintiff's allegations of fact as true, and must draw all reasonable inferences in the plaintiff's favor. *Potter, 208 F. Supp. 2d at 417* (citations omitted).

II. Sovereign Immunity, Consent to Suit, and Exceptions

Under the principle of sovereign immunity, "the United States may not be sued without its consent and ... the existence of consent is a prerequisite for jurisdiction." *Adeleke v. United States, 355 F.3d 144, 150 (2d Cir. 2004)* (citations omitted); see *Guccione v. United States, 670 F. Supp. 527, 529 (S.D.N.Y. 1987).* Pursuant to the Federal Tort Claims Act ("FTCA"), *28 U.S.C. § § 1346, 2671 et seq.*, the United States has consented to suit under certain limited circumstances:

> [The district courts] shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). As a further limitation to the scope of consent, *§ 2680 of the FTCA* enumerates various exceptions to the waiver of sovereign immunity, including *§ 2680(b)* (the "Postal Matter Exception") and *§ 2680(h)* (the "Intentional Torts Exception"). Because the United States' consent to suit is a prerequisite for jurisdiction, claims that fall within the enumerated exceptions, or claims that do not satisfy the requirements of *§ 1346(b)(1)*, must be dismissed for lack of subject matter jurisdiction. See *Dorking*

Genetics v. United States, 76 F.3d 1261, 1263-64 (2d Cir. 1996); *Birnbaum v. United States, 588 F.2d 319, 322 (2d Cir. 1978)*.

Congress has also waived the Postal Service's sovereign immunity by providing, in the Postal Reorganization Act ("PRA"), that the Postal Service may "sue and be sued." *39 U.S.C. § 401(1)*. However, the scope of that waiver of immunity is not without limits with respect to tort claims. Specifically, *§ 409(c) of the PRA* limits the *§ 401(1)* waiver by providing that any tort claim against the Postal Service is subject to the remedies and restrictions of the FTCA. *39 U.S.C. § 409(c)* ("[The FTCA] shall apply to tort claims arising out of activities of the Postal Service."); see *Smith v. Potter, 187 F. Supp. 2d 93, 98 (S.D.N.Y. 2001)*; see also *Loeffler v. Frank, 486 U.S. 549, 557, 108 S. Ct. 1965, 1970, 100 L. Ed. 2d 549 (1988)* ("Congress expressly included several ... specific limitations on the operation of the sue-and-be-sued clause [including *§ 409*]."); *Franchise Tax Bd. v. United States Postal Serv., 467 U.S. 512, 519, 104 S. Ct. 2549, 2553, 81 L. Ed. 2d 446 (1984)* (noting the applicability of the FTCA to the Postal Service via *§ 409(c)*); *Active Fire Sprinkler Corp. v. United States Postal Serv., 811 F.2d 747, 753 (2d Cir. 1987)* ("One might note that the PRA also incorporated the provisions of the [FTCA]. And by doing so, Congress explicitly has narrowed the waiver of immunity contained in the 'sue or be sued' clause of *section 401(1)*." (citations omitted)). Tort claims brought against the Postal Service, therefore, are subject to the limitations on sovereign immunity expressed in the FTCA.

A. Postal Matter Exception

Under *28 U.S.C. § 2680(b)*, the government's waiver of sovereign immunity in the FTCA does not extend to "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." The Court of Appeals for the Second Circuit analyzed this provision in *Marine Insurance Co. v. United States, 378 F.2d 812 (2d Cir. 1967)*, a case involving a package of jewels that "was stolen while it was in the normal flow of mail" by a federal employee. *Id. at 813, 815.* The employee was apprehended and convicted, and the Second Circuit held that the Postal Matter Exception barred the plaintiff's claim for recovery against the United States. *Id. at 813-14.* The Second Circuit, in Birnbaum, specifically upheld the decision in Marine Insurance: "The claim in Marine Insurance was ... [for the] "loss" [of the package] from the postal system," and therefore "fell within the postal exception." *Birnbaum, 588 F.2d at 328 n.20.*

The relevant facts in this case are indistinguishable from the facts in Marine Insurance. As in *Marine Insurance,* the plaintiffs' packages were allegedly stolen from the mails and thus all plaintiffs' claims fall squarely within the Postal Matter Exception. For this reason alone the Court lacks jurisdiction over all plaintiffs' claims, as the root of all the claims is the conversion of the packages.

B. Intentional Torts Exception

The FTCA provides, in *§ 2680(h)*, that "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" is excepted from the FTCA's waiver of sovereign immunity - i.e., the federal government does

not consent to suit for these torts or for claims arising out of these torts. While the question whether this provision bars suits for all intentional torts is open to debate, compare *Guccione v. United States, 847 F.2d 1031, 1036 (2d Cir. 1988)* ("The United States is not liable for the intentional torts of those carrying out its business ...."), with *Birnbaum, 588 F.2d at 328* ("Although *[§ 2680(h)]* might be construed as excepting all intentional torts, the Government does not urge that reading upon us."), at the very least the enumerated torts are excepted from the waiver of sovereign immunity.

Furthermore, the statute bars claims "arising out of" the enumerated torts. The Second Circuit has repeatedly stated that claims for the enumerated torts cannot simply be clothed "in the garb of negligence," thus avoiding the restrictions of the FTCA. See *Guccione, 847 F.2d at 1034* (quoting *Johnson v. United States, 788 F.2d 845, 850 (2d Cir. 1986))*. Indeed, the Supreme Court of the United States has held that, absent a special, independent duty of care that does not depend on the employment status of the intentional tortfeasor, a negligence claim that is based on one of the enumerated intentional torts is barred. *Sheridan v. United States, 487 U.S. 392, 101 L. Ed. 2d 352, 108 S. Ct. 2449 (1988).*

The Intentional Torts Exception serves as an additional barrier to several of plaintiffs' claims which, according to plaintiffs, "arise[] out of three torts: (a) conversion; (b) the fraudulent misrepresentations in the postal manifests; and (c) the post office's incredible negligence that permitted such clearly foreseeable misrepresentations and theft to take place repeatedly, uninterrupted, for close to two years." Plaintiffs'

Memorandum in Opposition ("Pl. Mem.") at 11. To the extent that plaintiffs' claims for money had and received, unjust enrichment, negligent supervision, concerted action, and civil conspiracy arise out of the fraudulent misrepresentations in the postal manifests, those claims fall within the Intentional Torts Exception and this Court lacks jurisdiction over those claims on that basis.

III. Jurisdictional Barriers Under New York Law

Under *28 U.S.C. § 1346(b)*, the general Jurisdictional provision of the FTCA, for a plaintiff to pursue an FTCA claim against the government, the United States must be amenable to suit as if a private person under the law of the state where the act or omission occurred. Because the alleged conversions took place in New York, New York law applies here.

A. Conversion, Civil Conspiracy, and Concerted Action

New York, like most states, recognizes the doctrine of respondeat superior, by which an employer may be vicariously liable for the torts of an employee if the employee's conduct is within the scope of his or her employment. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § § 69-70 (5th ed. 1984) (hereinafter Prosser). The scope of employment is "highly indefinite," as many methods, "even ... quite improper ones, of carrying out the objectives of the employment," may be grounds for holding an employer liable for an employee's torts. See Prosser § 70.

Courts in New York are agreed, however, that theft by an employee is not within the scope of the employment, and employers are not held liable for thefts by employees. See *Island Associated Coop., Inc.*

v. Hartmann, 118 A.D.2d 830, 500 N.Y.S.2d 315 (2d Dep't 1986); *Benjamin v. Brooklyn Trust Co., 185 Misc. 296, 57 N.Y.S.2d 816 (2d Dep't 1945)*. See also *Saghezi v. Reno, 1996 U.S. Dist. LEXIS 13447, No. 94 Civ. 8291 (HB), 1996 WL 524338 (S.D.N.Y. Sept. 16, 1996)*; *Int'l Fragrances, Inc. v. M.V. "San Martin I," 1992 U.S. Dist. LEXIS 5241, No. 90 Civ. 6972 (LJF), 1992 WL 93220 (S.D.N.Y. Apr. 21, 1992)*. Instead, theft by an employee is an example of frolic and detour:

> If a servant steps outside of his employment to do some act for himself, not connected with the master's business, there is no more responsibility for what he does than for the acts of any stranger. If he has no intention, not even in part, to perform any service for the employer, but intends only to further a personal end, his act is not within the scope of the employment.

Prosser § 70; see *Island Associated, 118 A.D.2d 830, 500 N.Y.S.2d at 316* (holding that "torts committed for personal motives unrelated to the furtherance of the employer's business" cannot be within the scope of the employment).

Furthermore, an employer who has no notice of suspicious activity and no reason for suspicion can assume that employees are performing their work with integrity. See *Benjamin, 185 Misc. 296, 57 N.Y.S.2d at 817*; *Ehrich v. Guaranty Trust Co., 194 A.D. 658, 186 N.Y.S. 103, 107 (1st Dep't 1921)* ("An employer is not bound to assume that an employee, whom he has no reason to suspect of dishonesty, will or may commit a crime. On the contrary, the presumption is that he will do right and not wrong." (citations omitted)).

Plaintiffs refer to *Rudge v. Laidlaw-Coggeshall, Inc., 96 A.D.2d 837, 465 N.Y.S.2d 591 (2d Dep't 1983)*, and *Sports Car Centre v. Bombard, 249 A.D.2d 988, 672 N.Y.S.2d 201 (4th Dep't 1998)*, as examples of cases where an employer was held liable for an employee's misappropriation of checks made payable to the employer. These two cases appear to represent a minority view in contradiction to the general view that employers are not liable for theft by employees. Also, the conduct in these cases was much closer to the scope of the employment than the conduct alleged by plaintiffs, i.e., the employees in these two cases had the authority to accept checks on behalf of their employers.

The alleged thefts committed by the Postal Service employees are not within the scope of their employment. In no way can it be said that the "business" of the Postal Service is to convert its patrons' mail, so in no way were the employees here carrying out the business of their employer. Indeed, no allegation has been made that the employees were acting out of any motive other than personal pecuniary gain.

In addition, no allegation has been made that the Postal Service had any reason to be suspicious of its employees, or to doubt the integrity of the employees' performance of their work. At best, plaintiffs draw the unreasonable conclusion that, because the alleged conversions took place over almost two years, the Postal Service must have known of the conversions. For these reasons, plaintiffs' conversion claim is not cognizable under New York law and is therefore barred by *§ 1346 (b)(1) of the FTCA.*

Moreover, under New York law, no substantive tort of civil conspiracy exists. See *Smith v. Fitzsimmons, 180 A.D.2d 177, 584 N.Y.S.2d 692, 695 (4th Dep't 1992); Falle v. Metalios, 132 A.D.2d 518, 517 N.Y.S.2d 534, 536 (2d Dep't 1987).* Thus, because plaintiffs' underlying claim of conversion is not cognizable under New York law, plaintiffs' conspiracy claim is similarly barred by the FTCA.

It is unclear to the Court what sort of claim plaintiffs are attempting to assert as "concerted action." The language of the pleading is language of civil conspiracy. Because plaintiffs made no attempt to explain this cause of action in their Memorandum, and because, as best this Court can tell, the claim is essentially a civil conspiracy claim, the concerted action claim is also dismissed.

B. Negligent Supervision

While New York does recognize a cause of action for negligent hiring and supervision, "liability will attach on such a claim only when the employer knew or should have known of the employee's [tortious] propensities." *Yeboah v. Snapple, Inc., 286 A.D.2d 204, 729 N.Y.S.2d 32, 33 (1st Dep't 2001)* (citation omitted). Where there is no showing that defendant employers knew of such propensities, or that there had been any indication that would have alerted the employer to the possibility of tortious conduct, the torts of the employee cannot be considered reasonably foreseeable and, under New York law, a negligent supervision claim must be dismissed. Id.; see *Well v. Rambam, 300 A.D.2d 580, 753 N.Y.S.2d 512, 514 (2d Dep't 2002)* ("A necessary element of a cause of action alleging negligent supervision ... is that the employer knew or should have

known of the employee's propensity for the conduct which caused the injury." (quotation and citation omitted)); *Detone v. Bullit Courier Serv., Inc., 140 A.D.2d 278, 528 N.Y.S.2d 575, 576 (1st Dep't 1988)* (reversing a jury verdict in favor of plaintiffs because of plaintiffs' failure to prove that defendant had "knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm." (citation omitted)).

As noted above, no allegation has been made that the Postal Service had any reason to know of its employees' tortious propensities. This claim, therefore, cannot stand under New York law and this Court lacks jurisdiction under the FTCA.

C. Unjust Enrichment and Money Had and Received

The equitable claim of unjust enrichment will lie only if a plaintiff can show "that the defendant was enriched, that such enrichment was at plaintiff's expense, and that the circumstances were such that in equity and good conscience the defendant should return the money or property to the plaintiff." *Dolmetta v. Uintah Nat'l Corp., 712 F.2d 15, 20 (2d Cir. 1983)* (citation omitted). Similarly, money had and received "is an equitable cause of action premised upon unjust enrichment ... [where] one party possesses money that in equity and good conscience [the party] ought not to retain and that belongs to another." *Hamlin Beach Camping, Catering, & Concessions Corp. v. State of New York, 303 A.D.2d 849, 756 N.Y.S.2d 354, 358 (3d Dep't 2003)* (quotations and citations omitted).

As noted above, New York law will not hold the Postal Service liable for conversion committed by its

employees where the Postal Service did not have reason to know of its employees' tortious propensities. Equity and good conscience, therefore, do not demand that the Postal Service be held accountable for the conduct of its employees who may have been unjustly enriched at plaintiffs' expense or who may possess property that belongs to plaintiffs. Thus, these claims are barred by the jurisdictional provision of the FTCA.

V. 12(b)(6)

Having found that plaintiffs' claims are not cognizable under New York law for purposes of jurisdiction under *§ 1346(b)(1) of the FTCA*, this Court finds in the alternative, and for the same reasons, that all plaintiffs' claims should be dismissed under *Federal Rule of Civil Procedure 12(b)(6)*.

Conclusion

This Court does not have jurisdiction, pursuant to *28 U.S.C. § § 1346(b)(1), 2680(b)*, or *2680(h)*, over plaintiffs' claims. Alternatively, plaintiffs fail to state claims under New York law upon which relief can be granted. Thus, all plaintiffs' claims are dismissed. The Clerk of the Court is instructed to close this case and remove it from the Court's active docket.

SO ORDERED.

Dated: New York, New York

September 16, 2004

JOHN F. KEENAN

United States District Court

UNITED STATES POSTAL SERVICE

July 1, 2002

DJ of America
15 W 47th St STE 1200
New York, NY 10036-3311

Attached is a PARTIAL REPRODUCTION of postal insurance claim number 00-2944-797. We have completed our adjudication of this claim and have determined that it must be disallowed.

Postal records indicate that the article was not rightfully in the mail since it had not been ordered by the addressee.

Any appeal to the above decision must be submitted in writing and identified by returning this letter and attachment within 90 days from the date of this letter.

Sincerely,
s/
Willie B. Mixon, Supervisor
Claims and Inquiry Section
Attn: TYGART SUSAN K
062702 Postal Data Center
PO BOX 80142
Saint Louis MO 63180-0142
1-88-601-9328

UNITED STATES POSTAL SERVICE

July 1, 2002

DJ of America
15 W 47th St STE 1200
New York, NY 10036-3311

Attached is a PARTIAL REPRODUCTION of postal insurance claim number 00-2944-783. We have completed our adjudication of this claim and have determined that it must be disallowed.

Postal records indicate that the article was not rightfully in the mail since it had not been ordered by the addressee.

Any appeal to the above decision must be submitted in writing and identified by returning this letter and attachment within 90 days from the date of this letter.

Sincerely,
s/
Willie B. Mixon, Supervisor
Claims and Inquiry Section
Attn: TYGART SUSAN K
062702 Postal Data Center
PO BOX 80142
Saint Louis MO 63180-0142
1-88-601-9328

ALPHA GROUP
Investigations-Security Consultants
100 Broadhollow Road, Suite 200
Framingdale, NY 11735
www.alphagp.com
(631) 454-1100
1(877) 346-2800
Fax: (631) 454-0625

PLEASE INCLUDE IN ALL CORRESPONDENCE
ALPHA REFERENCE: AG # 409

November 15, 2004

D.J. of America, Inc.
15 W. 47th Street, Suite 1200
New York, NY 10036
Attn: Mr. Neel G. Thacker

Re: Background Investigation

Dear Mr. Thacker:

The following is our report regarding the above referenced assignment. The services of Alpha Group were retained for the purpose of conducting a background investigation regarding Terrence R. Austin and Alberto Alvarez.

By direction of the undersigned, Investigator: Frank Shea and Research Analyst Michael Yacobellis of Alpha Group were assigned to conduct this investigation.

With the assistance of confidential databases available to Alpha Group, a background investigation was

conducted on the above. The following are the results of this investigation.

REDACTED CONFIDENTIAL INFORMATION.

SUMMARY

It should be noted that Mr. Alvarez recently sold his residence of 552 Morris Park Avenue Bronx, NY 10460. At this time, new information regarding Mr. Alvarez's relocation has not been confirmed.

Both Terrence Austin and Albert Alvarez appeared to have serious financial problems which include bankruptcies, liens, judgments and foreclosures. Based on the financial status of both individuals it would seem questionable that any responsible business would place these two employees in a position involving large amounts of cash or valuable merchandise transactions.

Alpha Group has conducted many due diligence investigations. Upon the results found in the backgrounds of these individuals, it is certain that any bank , brokerage house or other responsible institution would not entrust an applicant with these backgrounds in any type of position that would involve a financial responsibility.

It is believed that both of these individuals work as clerks at the Rockefeller Station. The Rockefeller Station, being the center of Manhattan, is known to handle large financial transactions such as shipping valuables and other negotiable instruments.

Based on the above investigation, Alpha Group is forwarding this report for your information.

Thank you for the opportunity to assist you in this matter. Please feel free to contact me with any questions, concerns or further instructions. We

welcome the opportunity to serve you again according to your needs.

Sincerely,
s/
Karen M. Stincone
Chief Operating Officer.

TITLE 28 § 1346. United States as defendant

(b)
(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

TITLE 28 § 2680. Exceptions

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

TITLE 39 § 401. General powers of the Postal Service

Release date: 2005-10-11

The Postal Service shall have the following general powers:
(1) to sue and be sued in its official name;

TITLE § 409. Suits by and against the Postal Service

(c) The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

FILED
JUL 31 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1148

In the Supreme Court of the United States

C.D. OF NYC, INC., ET AL., PETITIONERS

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
ROBERT S. GREENSPAN
WENDY M. KEATS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a claim based on alleged theft of mail by Postal Service employees "aris[es] out of the loss, miscarriage, or negligent transmission of letters or postal matter," 28 U.S.C. 2680(b), and thus is excepted from the Federal Tort Claims Act's waiver of sovereign immunity.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Anderson v. *USPS*, 761 F.2d 527 (9th Cir. 1985) 7
Avery v. *United States*, 434 F. Supp. 937 (D. Conn. 1977) 9, 10
Barbieri v. *Hartsdale Post Office*, 856 F. Supp. 817 (S.D.N.Y. 1994) 9
Birnbaum v. *United States*, 588 F.2d 319 (2d Cir. 1978) 8
Dolan v. *USPS*, 126 S. Ct. 1252 (2006) ..... *passim*
Dunn v. *Commodity Futures Trading Comm'n*, 519 U.S. 465 (1997) 8
Fridman v. *Postmaster Gen.*, No. CV-95-4049, 1996 WL 90543 (E.D.N.Y. Feb. 26, 1996) 9
Loeffler v. *Frank*, 486 U.S. 549 (1988) 11
Marine Ins. Co. v. *United States*, 378 F.2d 812 (2d Cir.), cert. denied, 389 U.S. 953 (1967) 3, 6
Sheldon Jewelry Co. v. *United States*, No. EP-00-CV-288-DB, 2001 WL 681247 (W.D. Tex. Mar. 29, 2001) ... 9
Staples v. *Christ Universal Temple*, No. 87 C 5577, 1987 WL 13441 (N.D. Ill. July 1, 1987) 7

Cases—Continued: Page

Suchomajcz v. *United States*, 465 F. Supp. 474 (E.D. Pa. 1979) 10
Sump v. *USPS*, No. 97-4133 RDR, 1997 WL 808658 (D. Kan. Dec. 19, 1997) 6
United States v. *Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763 (N.D. Tex. 2002) 9
Watkins v. *United States*, No. 02 C 8188, 2003 WL 1906176 (N.D. Ill. Apr. 17, 2003) 6

Statutes and rule:

Federal Tort Claims Act:
28 U.S.C. 1346(b) 2
28 U.S.C. 1346(b)(1) 3, 4, 7
28 U.S.C. 2671-2680 2
28 U.S.C. 2674 ..... 3, 4
28 U.S.C. 2680(a) 7
28 U.S.C. 2680(b) ..... *passim*
28 U.S.C. 2680(c) 7
28 U.S.C. 2680(f) 7
28 U.S.C. 2680(h) 3, 7, 10
28 U.S.C. 2680(i) 7
Postal Reorganization Act, 39 U.S.C. 101 *et seq.* 11
39 U.S.C. 401(1) 11
39 U.S.C. 409(c) 11
Fed. R. Civ. P. 12(b)(6) 3

In the Supreme Court of the United States

No. 05-1148

C.D. OF NYC, INC., ET AL., PETITIONERS

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is *reprinted in* 157 Fed. Appx. 428. The opinion of the district court (Pet. App. 6a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2005. The petition for a writ of certiorari was filed on March 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, diamond and jewelry merchants in New York City, sued the Postal Service in the United States District Court for the Southern District of New York. Their complaint alleged that, over a period of two years, two Postal Ser-

vice employees had conspired with two of petitioners' employees to steal jewelry from parcels brought to the Rockefeller Center Post Office for shipment to petitioners' customers. According to the complaint, petitioners' employees would hand the parcels to the Postal Service employees along with an original and one copy of a manifest. On the original manifest, the Postal Service employees would indicate receipt of all packages listed; petitioners' employees would return that document to their employer. On the duplicate manifest kept in Postal Service records, however, the Postal Service employees allegedly would strike entries for some of the packages. They would then, according to the complaint, keep those packages for themselves. Because of this conduct, petitioners allege, approximately $1.5 million in jewelry never reached petitioners' customers. Pet. App. 7a.

Petitioners' complaint, filed under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, asserted claims for conversion, money had and received, unjust enrichment, negligent supervision, concerted action, and civil conspiracy. Pet. App. 2a, 7a. The government moved to dismiss for lack of jurisdiction, arguing, *inter alia*, that the suit fell within 28 U.S.C. 2680(b), which excepts "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" from the FTCA's waiver of the United States' sovereign immunity. Pet. App. 2a-3a, 7a.

2. The district court granted the government's motion and dismissed the complaint. Pet. App. 6a-18a. The court noted that "[petitioners'] packages were allegedly stolen from the mails" and "the root of all [their] claims is the conversion of the packages." *Id.* at 11a. Thus, the court explained, all of petitioners' claims "fall squarely within the Postal Matter Exception," *i.e.*, 28 U.S.C. 2680(b), and "[f]or this reason alone the Court lacks jurisdiction over all [petitioners'] claims." Pet. App. 11a.

The court also found two additional independent jurisdictional flaws. First, the court held that, to the extent petitioners' claims "arise out of the fraudulent misrepresentations in the postal manifests," the FTCA's intentional torts exception, 28 U.S.C. 2680(h), divested it of jurisdiction. Pet. App. 13a.[1] Second, the court held that it lacked jurisdiction because a private employer would not be liable under New York state law for the conduct alleged. Pet. App. 13a-18a; see 28 U.S.C. 1346(b)(1) (limiting the FTCA's jurisdictional grant to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"); see also 28 U.S.C. 2674 (similarly defining the substantive scope of FTCA liability).[2]

3. The court of appeals affirmed in a summary order. Pet. App. 1a-5a. The court noted that in *Marine Insurance Co.* v. *United States*, 378 F.2d 812, 814 (2d Cir.), cert. denied, 389 U.S. 953 (1967), it had held that "theft of parcels by a federal employee responsible for the supervision of mail * * * falls within the [postal matter] exception." Pet. App. 3a. In this case, the court observed, "[petitioners] complain of mail brought to a United States Post Office, handed to USPS employees, and stolen by the persons employed by the USPS to handle mail." *Ibid.* Accordingly, the court of appeals held, *Marine Insurance* governed this case, and the district court

---

[1] The intentional torts exception provides that the FTCA's waiver of sovereign immunity "shall not apply" to, *inter alia*, "[a]ny claim arising out of * * * misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h).

[2] For the same reason, the court held that petitioners' claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted. Pet. App. 18a.

was correct to dismiss the suit for lack of jurisdiction. *Id.* at 3a-4a.[3]

ARGUMENT

Petitioners contend (Pet. 9-17) that the court of appeals erred in holding that 28 U.S.C. 2680(b) bars a claim for injuries arising from the theft of mail, and that the decision below conflicts with this Court's decision in *Dolan* v. *United States Postal Service*, 126 S. Ct. 1252 (2006). Notwithstanding these contentions, the decision below is correct and conflicts with no decision of this Court or of another court of appeals. Further review therefore is not warranted.

1. a. The court of appeals correctly concluded that the postal matter exception bars a claim against the United States arising out of the alleged theft of postal matter. The FTCA waives the United States' sovereign immunity in certain cases involving "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," 28 U.S.C. 1346(b)(1), and renders the United States liable "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674. That waiver is qualified by, *inter alia*, the postal matter exception, which preserves sovereign immunity as to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b); see *Dolan*, 126 S. Ct. at 1256. Here, petitioners allege that, because of certain employees' misconduct, their customers did not receive parcels intended to reach them through the mail. Because petitioners' claims thus "aris[e] out of the loss * * * of letters or postal matter," 28 U.S.C. 2680(b), they are barred by the plain language of the postal matter exception.

---

[3] The court did not reach or discuss the district court's additional grounds for dismissal. Pet. App. 4a.

b. That result is not, as petitioners contend (Pet. 12), "at odds" with this Court's decision in *Dolan*. The petitioner in *Dolan* alleged that she had been injured when she tripped on mail that a postal employee had negligently left on her porch. In rejecting the government's assertion that the petitioner's claim arose out of "negligent transmission" of mail and was thus barred by the postal matter exception, the Court noted that the statutory terms "loss" and "miscarriage" "refer to failings in the postal obligation to deliver mail in a timely manner to the right address." *Dolan*, 126 S. Ct. at 1257. "[I]t would be odd," the Court reasoned, "if 'negligent transmission' swept far more broadly" to include injuries, such as those alleged in *Dolan*, "that happen to be caused by postal employees but involve neither *failure to transmit mail* nor damage to its contents." *Ibid.* (emphasis added). This case plainly involves "failure to transmit mail," as contemplated by *Dolan*, and thus falls within the postal matter exception.

The Court in *Dolan* did state that, "as both parties acknowledge, mail is 'lost' if it is destroyed or misplaced and 'miscarried' if it goes to the wrong address." *Dolan*, 126 S. Ct. at 1257. But that brief discussion did not, as petitioners assert (Pet. 9, 12), limit the postal matter exception to mail that is "lost" only in the sense that it is "destroyed or misplaced," or "miscarried" only in the sense that it "goes to the wrong address." Rather, *Dolan* simply cited these as examples of "failings in the postal obligation to deliver mail in a timely manner to the right address," 126 S. Ct. at 1257, and it made no distinction between inadvertent and intentional failures of delivery. As the Court explained, Congress intended the postal matter exception to preserve immunity for "injuries arising, directly or consequentially, because mail either *fails to arrive at all* or arrives late, in damaged condition, or at the wrong address." *Id.* at 1258 (emphasis added). In other words, the United States is immune from suit for

"*nondelivery* or late delivery * * * or from negligent handling of a mailed parcel," for these harms "are the sort primarily identified with the Postal Service's function of transporting mail throughout the United States." *Ibid.* (emphasis added).

The claims asserted in this case stem entirely from the "nondelivery" of parcels allegedly stolen by Postal Service employees—*i.e.*, from those parcels' "fail[ure] to arrive at all"—and not from some injury unrelated to a failure of delivery. Accordingly, the court of appeals' conclusion that the postal matter exception bars these claims is fully consistent with *Dolan*.

c. The government is aware of no court decision finding a mail-theft claim to be outside the scope of the postal matter exception. The Second Circuit, the only court of appeals to address whether the exception applies to such a claim, has twice held—in this case and in *Marine Insurance Co.* v. *United States*, 378 F.2d 812, cert. denied, 389 U.S. 953 (1967)—that it does so apply. District courts have held the same. See *Watkins* v. *United States*, No. 02 C 8188, 2003 WL 1906176, at *5 (N.D. Ill. Apr. 17, 2003) (noting that if "loss" did not include employee theft, "litigants would simply recast their lost-mail claims as ones for mail theft in order to survive the jurisdictional bar"); *Sump* v. *USPS*, No. 97-4133 RDR, 1997 WL 808658, at *2 (D. Kan. Dec. 19, 1997); *Staples* v. *Christ Universal Temple*, No. 87 C 5577, 1987 WL 13441, at *2 (N.D. Ill. July 1, 1987).[4]

2. Nonetheless, petitioners present a variety of reasons why their claim ostensibly does not fall within the postal matter exception. None of those proffered reasons merits this Court's consideration.

---

[4] See *Anderson* v. *USPS*, 761 F.2d 527 (9th Cir. 1985) (holding that the postal matter exception bars claims against the United States when mail is stolen *from* a postal employee).

a. Petitioners' contention (Pet. 12-14) that the postal matter exception is inapplicable to intentional acts, like the thefts alleged here, is incorrect. As noted above, the FTCA waives sovereign immunity for both "negligent" and "wrongful" conduct by federal employees, 28 U.S.C. 1346(b)(1). But it also enumerates exceptions to that waiver, and many of those exceptions make no distinction between intentional and unintentional conduct. See, *e.g.*, 28 U.S.C. 2680(a) (claim based on exercise of discretionary function, "whether or not the discretion involved be abused"); (c) (claim based on assessment of tax or customs duty); (f) (claim for damages caused by quarantine); (h) (claim arising out of specified intentional torts); (i) (claim for damages caused by monetary regulation or fiscal operations of the Treasury); see also *Dolan*, 126 S. Ct. at 1259 (noting the "sweeping language" of some FTCA exceptions). Thus, it is not at all unusual for an FTCA exception to apply to intentional conduct.

Against that background, it is evident that "loss" and "miscarriage" do not refer only to negligent conduct. First, the postal matter exception uses the word "negligent" to qualify only "transmission"; the preceding terms "loss" and "miscarriage," in contrast, stand unmodified. See 26 U.S.C. 2680(b). The natural inference is that, while the postal matter exception applies to only that transmission which is negligent, the exception applies to all loss and miscarriage of mail, even when it does not result from mere negligence. Indeed, if the postal matter exception were construed to apply only to negligent conduct in all instances, the use of the term "negligent" to modify "transmission" would be superfluous. That construction should therefore be avoided. See, *e.g.*, *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) (noting "the doctrine that legislative enactments should not be construed to render their provisions mere surplusage").

Second, as *Dolan* noted, the purpose of the postal matter exception is to shield the Postal Service from liability for "injuries arising, directly or consequentially, because mail either fails to arrive at all, or arrives late, in damaged condition, or at the wrong address." *Dolan*, 126 S. Ct. at 1258; see *id.* at 1257 (counseling reliance on, *inter alia*, "the purpose and context of the statute"). Any of those mishaps, as described by the Court, could result from either negligent or intentional conduct by postal employees.

For both of these reasons, it is unsurprising that petitioners are unable to identify any decision limiting the "loss" and "miscarriage" prongs of the postal matter exception to claims arising from negligent, as opposed to intentional, conduct. In *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978), on which petitioners principally rely (Pet. 13), the Central Intelligence Agency had intentionally opened letters sent to and from the Soviet Union, then returned the letters to the mails for delivery to the addressees. Although the court did state that "[t]he language of the exception * * * indicates that it was not aimed to encompass intentional acts," 588 F.2d at 328, the context makes clear that the court was referring only to the "negligent transmission" component of the exception. See *ibid.* ("Had Congress intended to bring *intentional* disturbance of the integrity of a letter within the postal exception, it would not have used the term 'negligent transmission.' Nor were the letters lost or miscarried. 'Miscarriage' in the context of mail means misdelivery."). Notably, the court saw no conflict with its prior ruling in *Marine Insurance Co.*, *supra*, which barred a claim for the "loss" of a mailed package through theft by a customs employee. See *Birnbaum*, 588 F.2d at 328 n.20.[5] *Avery* v. *United States*, 434 F. Supp. 937

[5] Petitioners otherwise cite (Pet. 13) a bevy of other cases, none of which excludes intentional misconduct from the scope of "loss" or "miscarriage." *Barbieri* v. *Hartsdale Post Office*, 856 F. Supp. 817

(D. Conn. 1977), which prefigured *Birnbaum*, held that the postal matter exception did not bar suit on materially identical facts. See *id.* at 945.

In any event, as the district court apprehended (Pet. App. 11a-13a), the nature of the intentional conduct alleged in this case provides another reason why petitioners' claims are barred. To the extent those claims rely on the alleged fraudulent misrepresentations in the postal manifests, 28 U.S.C. 2680(h) excepts the claims from the FTCA's waiver of sovereign immunity. See 28 U.S.C. 2680(h) (stating that the waiver does not apply to claims arising from, *inter alia*, "misrepresentation" or "deceit").

(S.D.N.Y. 1994), was a suit claiming damages because an erroneous postmark led to a tax penalty; the court held the postal matter exception inapplicable because the mail was "neither misdelivered nor lost," nor was it negligently *transmitted* to the recipient. *Fridman* v. *Postmaster General*, No. CV-95-4049, 1996 WL 90543 (E.D.N.Y. Feb. 26, 1996), was a suit for alleged negligent failure to forward the plaintiff's mail; the court found the postal matter exception "squarely" applicable. *Id.* at *1. Similarly, in *Sheldon Jewelry Co.* v. *United States*, No. EP-00-CV-288-DB, 2001 WL 681247 (W.D. Tex. Mar. 29, 2001), the court held that the "negligent transmission" component of the postal matter exception barred suit for the negligent delivery of a package to a person who falsely represented herself as the intended addressee. *United States* v. *Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763 (N.D. Tex. 2002), involved a mail pre-sort operator's claims that the Postal Service had failed to prevent it from fraudulently understating the amount of mail it deposited with the Postal Service for transmission, and that the Postal Service had given refund checks to the operator's "rogue employee." *Id.* at 766, 774. The court held that, because the case "involve[d] problems unrelated to the actual delivery of mail to the ultimate recipient," the postal matter exception did not bar the claims. *Id.* at 778. Finally, the court in *Suchomajcz* v. *United States*, 465 F. Supp. 474 (E.D. Pa. 1979) (cited at Pet. 10 n.6), found that the term "negligent transmission" did not encompass a claim based on the Postal Service's failure to prevent illegal flammable materials from entering the mails, where those materials caused the deaths of several children.

b. Petitioners also assert (Pet. 14-15) that the Postal Service cannot claim the benefit of Section 2680(b) because it has disallowed petitioners' insurance claims for the allegedly stolen parcels. That assertion is without merit. Petitioners' postal insurance claims are governed by the terms of the relevant insurance contracts, not by the FTCA. Moreover, petitioners did not place the insurance claims in issue in the complaint, nor did they introduce into evidence the disallowance notices (Pet. App. 19a-20a) on which they now rely.[6] Thus, unsurprisingly, the court of appeals did not address this contention, and there is no reason why this Court should do so.

In any event, there is no inconsistency between the Postal Service's denial of petitioners' insurance claims and the government's assertion of sovereign immunity in this action. See *Dolan*, 126 S. Ct. at 1259 ("[L]osses of the type for which immunity is retained under § 2680(b) are *at least to some degree* avoidable or compensable through postal registration and insurance." (emphasis added)). The Postal Service's stated reason for denying petitioners' insurance claims—namely, that "the article was not rightfully in the mail since it had not been ordered by the addressee," Pet. App. 19a, 20a— may raise a question of contractual interpretation; it does not suggest, however, that the parcels' loss somehow falls outside the postal matter exception. To the contrary, petitioners allege that the parcels in question were purloined after they had been committed to the Postal Service for processing and transmission. See Pet. 5. Accordingly, the Postal Service's denial of petitioners' insurance claims does not place their FTCA claims outside the scope of the postal matter exception.

c. Finally, petitioners contend (Pet. 15-17) that, by virtue of the Postal Reorganization Act (PRA), 39 U.S.C. 101 *et seq.*,

[6] Petitioners also did not put in evidence in the district court a third document appended to the petition, Pet. App. 21a-24a, purporting to be a report from a private investigator.

the Postal Service must be liable for thefts by its employees within the scope of their employment. That argument is readily disposed of and does not warrant this Court's review. The PRA waives the federal sovereign immunity of the Postal Service in certain respects. 39 U.S.C. 401(1). But, as *Dolan* made clear, that statute also provides that the Federal Tort Claims Act, including its exceptions, "shall apply to tort claims arising out of [Postal Service] activities." *Dolan*, 126 S. Ct. at 1256 (quoting 39 U.S.C. 409(c)); see *Loeffler* v. *Frank*, 486 U.S. 549, 557 (1988) (noting that "Congress expressly included several * * * specific limitations on the operation of the [PRA's] sue-and-be-sued clause," including the provision making the FTCA applicable). Thus, notwithstanding the Postal Service's capacity to "sue and be sued" for other matters in the same manner as a private business, a tort action against the Postal Service for employee theft remains governed by the FTCA and its exceptions, including the postal matter exception. And, for the reasons stated above, the postal matter exception bars petitioners' claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

ROBERT S. GREENSPAN
WENDY M. KEATS
Attorneys

JULY 2006